IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 11

LUMBERMEN'S MUTUAL CASUALTY COMPANY
Petitioner

versus

FLORENCE R. ELBERT
Respondent

ORIGINAL BRIEF ON BEHALF OF PETITIONER

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AUTHORITIES

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OPINIONS BELOW

The opinion of the district court on motion to dismiss is reported at 107 Fed. Sup. 299. Its opinion on rehearing is reported at 108 Fed. Sup. 157. The opinion of the Court of Appeal for the Fifth Circuit is reported at 201 Fed. (2) 500. Its opinion on rehearing is reported at 202 Fed. (2) 744.

JURISDICTION

The original opinion of the Court of Appeal was rendered January 29, 1953, and judgment entered. The appellee (petitioner herein) timely filed an application for

rehearing on February 18, 1953, which was denied March 17, 1953 . Invoking the jurisdiction of this Court under the provisions of 28 USC 1254(1), a petition for certiorari was filed June 13, 1953, and was granted May 17, 1954.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1.

Article III, Section 2 of the Constitution of the United States:

> "*The judicial power shall extend to all cases, in law and equity,* arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all case affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; *between citizens of different states;* between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof and foreign states, citizens or subjects." (emphasis ours)

2.

Title 28 USC, Section 1332(a):

> "The district courts shall have original jurisdiction of all civil actions *where the matter in controversy*

exceeds the sum of value of $3,000.00 exclusive of interest and costs, and *is between:*

"(1) *citizens of different states.*"
(emphasis ours)

3.

Louisiana Civil Code, Article 2315:

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it:*****"

4.

Louisiana Revised Statutes 22:655:

"No policy or contract of liability insuurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against

both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

QUESTIONS PRESENTED

The basic questions presented are:

1.

Is the real matter in controversy actually between citizens of different states such as vests jurisdiction in the federal court on the grounds of diversity, where a citizen of Louisiana proceeding under a statute of the State of Louisiana institutes a direct action against a foreign public liability insurer of another citizen of Louisiana to recover damages as the result of an act of negligence committed in Louisiana by the Louisiana assured? This question in turn involves the following subsidiary questions:

(a) Is the insured in such action an indispensable party?

(b) Should the federal court accept jurisdiction on the grounds of diversity of citizenship of parties where the court cannot do final and complete justice and the controversy may be left in such a condition that its final termination may be wholly inconsistent with equity and good conscience?

2.

Should such effect be given by the federal courts to an act of the legislature of Louisiana as would result in citizens of Louisiana being afforded an unfair and prejudicial advantage over nonresident litigants by invoking the jurisdiction of the federal court on the grounds of diversity of citizenship? This question in turn involves the following subsidiary questions:

(a) Are those provisions of the Louisiana R. S. 22:655 granting an injured party the right to sue a public liability insurer alone purely procedural and, if so, are they applicable in a federal court action?

(b) Should the federal court entertain jurisdiction on the grounds of diversity where such diversity as exists arises only by virtue of a state statute and where the proceedings in the federal court lead to a result substantially different from that which would be attained in the state court?

(c) Should the federal court exercise diversity jurisdiction where to do so would be prejudicial to the public interest and would not show proper regard for the rightful independence of state government in carrying out their domestic policy?

STATEMENT OF CASE

On February 21, 1951, Mrs. Florence R. Elbert, *a resident and citizen of Shreveport, Louisiana*, was injured after she had alighted from an automobile which had been brought to a stop in front of her home *in Shreveport, Louisiana*. The automobile was owned by Mr. S. W. Bowen, *a resident and citizen of Shreveport, Louisiana*, and at the time was being operated by his wife, Mrs. S. W. Bowen, *a resident and citizen of Louisiana*.

The Lumbermens Mutual Casualty Company had issued to Mr. S. W. Bowen a contract of public liability insurance covering the vehicle owned by him and driven by his wife under which said company obligated itself to pay on behalf of the insured those sums which the insured should become legally obligated to pay as damages because of bodily injuries arising out of the ownership, maintenance and use of the insured vehicle.

Under date of December 4, 1951, Mrs. Florence R. Elbert instituted the present action directly against Lumbermens Mutual Casualty Company alone. The jurisdiction of the federal court was urged upon the basis that the matter in controversy was between citizens of different

states (Title 28 USC Sec. 1332(a)). The institution of the action by the plaintiff against the public liability insurer alone was brought under the provisions of Louisiana Revised Statutes 22:655.

The Lumbermens Mutual Casualty Company moved to dismiss the action urging that the provisions of the Louisiana Revised Statutes 22:655 were procedural and, therefore, not applicable in the federal court and further that proper diversity of citizenship between the parties did not actually exist since the real matter in controversy was the determination of whether or not Mrs. S. W. Bowen, a citizen of Shreveport, Louisiana, had committed an act of negligence in Shreveport, Louisiana which had resulted in an injury to the plaintiff who was also a citizen of Louisiana.

The district court upheld the defendant's motion to dismiss with an opinion holding that to sustain diversity jurisdiction there must exist an actual, substantial controversy between citizens of different states; that in considering between whom the actual controversy existed the court must determine the principal purpose of the suit and the primary and controlling matter in dispute. Applying these principles the court concluded that it was obvious that the primary, controlling matter in dispute was the determination of the rights of the plaintiff, a citizen of Louisiana, against the alleged tort feasor, a citizen of Louisiana, under the cause of action created by Article 2315 of the Revised Civil Code of Louisiana (R 11-26, 107 Fed. Sup. 299).

The plaintiff filed a motion for rehearing which was overruled by the district court with an opinion further emphasizing that the only cause of action existing in favor of the plaintiff under the laws of Louisiana as the result of an alleged tort arises under Article 2315 of the Louisiana Revised Civil Code and that the actual and real controversy involved was the determination of the the issue of negligence as between the plaintiff and the driver of the automobile, both citizens of Louisiana (R 28-41, 108 Fed. Sup. 157).

The plaintiff appealed from the judgment of the district court sustaining defendant's motion to dismiss. The court below reversed the decision of the district court and ordered the case remanded without making any comment upon, or disposing of, the contentions and principles advanced by the district judge in his two written opinions and by the appellee in support of the decision of the district court. The court below merely declared that "upon principle and authority" the judgment of the district court was wrong and should, therefore, be reversed. Just what "principles" were relied upon were not stated and the only "authority" indicated by the court were three decisions previously rendered by that court, all of which had been considered and discussed at length in the opinion of the district court and none of which had discussed or considered the issues upon which the district court had based its conclusions (R 46-47, 201 Fed. Rpr. (2) 500).

The appellee in the court below timely filed an application for rehearing which was refused by a majority

of the court without any further written reasons. Judge Rives, however, dissented with written reasons (R 51-60, 202 Fed. Rpr. (2) 744). Judge Rives took note of the fact that suits by an injured party directly against an insurer may operate justly under the civil law of Louisiana where the appellate court has the right and the duty to review both the law and the facts in all civil cases and render judgment on their own findings without regard to the holding of a trial jury, but that in the federal courts such procedure cannot be followed; that it has been repeatedly recognized that juries are more prone to find liability and to assess heavy damages against an insurance company alone than against an insured, and that the mere mention of insurance to a jury is a reversible error in practically all of the states of this union. He further notes that one of the principal reasons for plaintiffs bringing this type of action in the federal court in Louisiana is to obtain the prejudicial advantage afforded by the federal jury system in cases of this nature, and that to entertain such litigation is in direct conflict with the purpose of diversity jurisdiction which was designed to avoid possible discrimination in favor of a resident over a non-resident litigant. He concluded that federal jurisdiction should be denied or declined because, "First, it involves the unconstitutional assumption of jurisdiction over controversies between citizens of the same state of Louisiana. Second, if not actually equitable in nature, the rights and procedure are so closely akin thereto that the same principles should be applied by the federal courts as in equity suits, and it should be held (a) that the insured is an indispensable

party defendant, and (b) that in the exercise of their sound discretion in matters prejudicial to the public interest and which threaten the rightful independence of state governments in carrying out their domestic policy, the federal courts should decline to exercise jurisdiction against the insurer alone."

The Lumbermens Mutual Casualty Company filed a petition for certiorari in this Court which was granted.

SUMMARY OF ARGUMENT

1.

The courts of the United States were created under the provisions of Article III of the Constitution and Section 2 thereof defines and limits their power and jurisdiction. A review of the arguments advanced in support of the acceptance by the states of those provisions of our Constitution show that the principal reason for vesting diversity jurisdiction in the federal courts was to afford a non-resident citizen a fair, unprejudiced and unbiased forum whenever he should become a litigant in a state other than his own. *The Historic Basis of Diversity Jurisdiction, 41 Harvard Law Review 483.*

2.

It is recognized that the policy of the statute (Title 28 U.S.C., Section 1332(a)) conferring jurisdiction on the ground of diversity of citizenship calls for its strict construction. Whether a case falls within the proper ob-

jects of the diversity jurisdiction must be ascertained from the "principal purpose of the suit" and "the primary and controlling matter in dispute." *City of Indianapolis et al vs. Chase National Bank, 314 U.S. 63, 86 Law. Ed. 47.* The purpose of the statute has been to close the federal courts to litigants who properly should litigate their controversies in state tribunals. *Steinberg vs. Toro, 95 Fed. Sup. 791 at 795.*

3.

The instant action is an ordinary personal injury suit wherein the plaintiff, a Louisiana citizen, seeks to have it judicially determined that the alleged tortfeasor, a Louisiana citizen, is legally obligated to pay damages as the result of an accident which happened in the State of Louisiana. This cause of action arises under *Louisiana Civil Code Article 2315* which provides that every act of man which causes damage "*obliges him by whose fault it happened*" to become responsible.

The Louisiana Direct Action Statute (L.R.S. 22:655) does not create any new basis for a tort action but merely provides that the injured person may have *a right of* direct *action* against the insurer within the terms and limits of the policy. *Reeves vs. Globe Indemnity Company of New York, 182 La. 905, 162 So. 724; Burke vs. Mass. Bonding & Insurance Company, 209 La. 495, 24 So. (2) 875.*

It is thus seen that the principal purpose of this suit and the primary and controlling matter in dispute involves a controversy between plaintiff and the alleged

tort-feasor, both Louisiana citizens. "*****it is perfectly clear that the insurance company in this case was not a primary wrong-doer in the sense of having directed or authorized, or brought about the commission of the tort, and at common law the cause of action against it and its insured would not have been a joint one****there is only one primary controversy in this case, whether or not plaintiff has been injured by the cupable act of the insured.***" *Lake vs. Texas News Company, 51 Fed. (2) 862 at 864 C.A. 5.*

4.

The purpose of diversity jurisdiction in the federal courts is to guard against possible discrimination by the state courts in favor of resident over non-resident litigants. *Am. Juris. Vol. 54, par. 57, pp. 710.* To hold that the Louisiana statute is sufficient to create federal jurisdiction is to defeat this very purpose. Louisiana citizens bringing a direct action against a public liability insurer alone before a jury in a federal court have a definite prejudicial advantage over the non-resident litigant. The mere mention of insurance to a jury is reversible error in most jurisdictions. *4 ALR(2) 761.* Such information is considered irrelevant, *Lee vs. Osmundson, 289 NW 63, S. Ct. Minn.;* to influence jurors to bring in verdicts based on scanty evidence, *Lavigne vs. Ballantyne, 17 Atl. (2) 845, S. Ct. R.I.;* encourages jurors to assess higher damages, *Buehler vs. Festus Mercantile Company, 119 SW(2) 961, S. Ct. Mo.;* and prevents the jury because of passion and prejudice from deciding the case strictly on the merits, *White vs. Makela, 8 NW(2) 123, S. Ct. Mich.*

5.

Final and complete justice cannot be rendered in actions of this sort unless the tort-feasor is a party to the proceedings. There is always two matters to be determined; the tort-feasor's responsibility to the plaintiff and the insurance company's responsibility to the tort-feasor. If the tort-feasor is not a party the court's decision on this latter question is certainly not binding upon him. Should the insurer in one of these actions deny both that the tort-feasor was guilty of negligence and aiso that their contract of insurance was in force and a federal jury return a "verdict for the defendant" there would be nothing to prevent the plaintiff from bringing a similar action in the state court against the tort-feasor alone who in turn could call upon his insurer to defend and assume responsibility. If it were otherwise the tort-feasor would be deprived of his rights without having had the opportunity of a hearing.

6.

Under the law of Louisiana the appellate courts have the right and the duty to review both the law and the facts in all civil cases and to determine for themselves, without intervention of a jury, the ultimate facts upon which their final decision will rest. *Louisiana Constitution of 1921, Article 7, Sections 10, 29; Parsons vs. Bedford, 3 Pet. 433 at 449, 7 Law. Ed. 732 at 737.* The federal courts, on the other hand, are forbidden to re-examine any fact tried by a jury otherwise than according to the rules of common law. *Wright vs. Paramount-Richards*

Theatres, 198 Fed. (2) 303, C.A. 5. It is thus seen that the prejudice and bias that exists against an insurance company in the minds of a lay jury is rectified by trained experienced jurists reviewing the evidence and making their independent findings of fact if the case is tried in the state court, but such is not done, nor possible, under the federal system. Obviously a substantially different result is obtained in the federal court, as Judge Rives observed (R-52) "this court would be naive not to realize that that factor has much to do with the bringing of most of the automobile damage suits in the federal courts rather than in the state courts of Louisiana."

In diversity cases the rights enjoyed under local laws should not vary because of enforcement in a federal court. *Reagan vs. Merchants Transfer & Warehouse Company, 337 U.S. 530, 93 Law. Ed. 1520* and the outcome of such litigation should be substantially the same as it would be if tried in a state court. *Guaranty Trust Company vs. York, 326 U.S. 96, 89 Law Ed. 2079.*

These cases involve matters of a purely local nature and in the proper administration of justice the federal court may and should decline jurisdiction. *Burford vs. Sun Oil Company, 319 U.S. 315, 87 Law. Ed. 1424.*

ARGUMENT

MAY IT PLEASE THE COURT:

PRELIMINARY STATEMENT

This is an action brought by a citizen of Louisiana against a non-resident insurance company seeking to re-

cover damages suffered as a result of alleged acts of negligence committed in the State of Louisiana by a citizen of Louisiana to whom the non-resident insurance company had issued a contract of public liability insurance. As pointed out by the opinion of the district court (R11 at 15, 107 Fed. Sup. 299 at 302) this is merely one of a large number of similar suits filed in the federal district courts of Louisiana which has doubled the work of that court, all of said suits being by citizens of Louisiana alleging that the controversy is between citizens of different states.[1] Judge Rives of the Fifth Circuit in his dissenting opinion recognized "that there is something fundamentally wrong with our legal theories when they permit the great bulk of the casualty damage suit litigation of Louisiana to clog the dockets of the federal courts." (R51, 202 Fed. Rpr. (2) 744, C.A. 5).

In this action, as well as the many other similar ones, complainant's only basis for jurisdiction in the fed-

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Footnote [1]: This is illustrated by the records of the U.S. District Court, Western District of Louisiana, which show:

Year	Total No. of cases based on diversity	Direct Actions against Ins Co.
1951	221	119
1952	199	98
1953	239	125
1954 (Jan.-June)	166	84
Totals	825	426

(the opinion of the district court sustaining this motion was rendered in September of 1952. During the months of October, November and December of 1952 there were only 8 direct action cases out of a total of 28 diversity cases filed.)

eral court is under the provisions of Title 28 U.S.C., Section 1332(a) which declares:

> "The district courts shall have original jurisdiction of all civil actions where *the matter in controversy* exceeds the sum or value of $3,000.00 exclusive of interest and costs, and *is between:*
>
> "(1) *Citizens of different states.*"
> (emphasis ours)

HISTORY OF DIVERSITY JURISDICTION

Before we examine the provisions of the Louisiana statute involved and consider its application to the instant problem, let us refresh our minds on the source from which the courts of the United States derive their existence and the rights and powers delegated to those courts.

Article III of the Constitution of the United States provides for the creation of the federal courts, and Section 2 thereof defines and limits their power and jurisdiction as follows:

> "The judicial power shall extend to all cases, in law and arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under

> grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

Title 28 U.S.C. Section 1332(a) referred to hereinabove is the act by which congress vests the federal courts with such jurisdiction as congress deemed proper within the limits of the constitutional provisions.

Alexander Hamilton stated in his essay addressed to the people of the State of New York in support of the proposed constitution:

> "To judge with accuracy of the proper extent of the federal judicature, it will be necessary to consider, in the first place, *what are its proper objects.*" (emphasis ours)
>
> *The Federalists No. 80*

It is quite obvious from the arguments advanced by Hamilton and by the other advocates of the national courts that the principal reason for vesting diversity jurisdiction in the federal courts (if not the sole reason) was to afford a non-resident citizen a fair, unprejudiced and unbiased forum whenever he should become a party to a suit in a state other than his own.

> See: *The Historic Basis of Diversity Jurisdiction, 41 Harvard Law Review 483*

It is interesting to note that the suggestion of giving this jurisdiction to the federal judiciary met with strenuous opposition from the Anti-Federalists (a faction which

would be referred to as "States-Righters" today). Patrick Henry, for instance, stated:

> "I see arising out of that paper, a tribunal, that is to be recurred to in all cases, when the destruction of the state judiciaries shall happen; and from the extensive jurisdiction of these paramount courts, the state courts must soon be annihilated."
>
> *The Historic Basis of Diversity Jurisdiction (supra) at page 489*

The author in the above mentioned law review article points out at page 308 that:

> "During the debates in the state conventions there had been frequent assurances that congress would prevent the dire consequences which the Anti-Federalists had been arising from the judiciary clause."

It is further observed that in the early application of these provisions the Supreme Court was fully cognizant that "*there was no reason for taking over business which the state courts could handle without serious prejudice to any national interest.*" It was never intended that this jurisdiction encompass matters between citizens of the same state. Alexander Hamilton in the essay mentioned was careful to point out that cases between citizens of the same state claiming lands under grants of different states "***are the only instances in which the proposed constitution directly contemplates the cognizance of disputes between the citizens of the same state.*"

In the early landmark case of *Bank of United States vs. Deveaux, 5 Cranch 61 at page 87*, Chief Justice Marshall stated:

> "The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it, where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws."

Before ending our brief discussion of the historical background of diversity jurisdiction, it must be observed that the fears of Patrick Henry and the Anti-Federalists have not disappeared with the passage of time but that since 1878 vigorous attempts have been made to limit this jurisdiction or to abolish it completely and that such legislation as introduced by Senator Norris in the 71st and 72nd congress designed to eliminate jurisdiction of suits between citizens of different states was favorably reported out each time by the senate judiciary committee.

56 Harvard Law Review 1226 et seq.

THE APPLICATION AND INTERPRETATION OF THE DIVERSITY JURISDICTION CLAUSE

An ever alert appreciation of the "proper objects" of the federal judicature and the stormy background of its creation have undoubtedly had an indelible effect upon our courts in their interpretation and application of the diversity jurisdiction provisions. It is a well recognized and established principle that:

"The policy of the statute conferring jurisdiction on the ground of diversity of citizenship calls for its strict construction, and the right to sue in a federal court on this ground must be exercised within the limits established. The intent of congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been vigorously enforced by the courts.****

"Congress granted jurisdiction to the federal courts in diversity of citizenship cases to guard against possible discrimination by state courts in favor of resident over-non-resident litigants.*****"

American Jurisprudence Vol. 54, par. 57, page 710

The principles announced by this Court in the case of *City of Indianapolis et al vs. Chase National Bank, 314 US 63, 86 L. Ed. 47* illustrate the strict inquiry which should be made in determining if a case falls within the "proper objects" of the diversity jurisdiction provisions. There the Court stated:

"To sustain diversity jurisdiction there must exist an 'actual', Helm vs. Zarecor, 222 US 32, 36, 56 L Ed. 77, 80, 32 S. Ct. 10, 'substantial,' Niles-Bement-Pond Co. vs. Iron Moulders Union, 254 US 77, 81, 65 L. Ed. 145, 48, 41 S. Ct. 39, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. Strawbridge vs. Curtiss, 3 Cranch (US) 267, 2 L. Ed. 435. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our

duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' Dawson vs. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 US 178, 180, 49 L. Ed. 713, 715, 25 S. Ct. 420. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interest,' Dawson vs. Columbia Ave. Sav. Fund, S. D. Title & T. Co., supra, at 181, exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit,' East Tennessee, V. & G. R. Co. vs. Grayson, 119 US 240, 244, 30 L. Ed. 382, 383, 7 S. Ct. 190, and the 'primary and controlling matter in disputes,' Merchants' Cotton Press & Storage Co., vs. Insurance Co. of N. A. 151 US 368, 385, 38 L. Ed. 195.*****"

The Court went on to say, in holding that the *actual controversy* required a realignment of parties:

"This is not a sacrifice of justice to technicality. For the question here is not whether Chase and Indianapolis Gas may pursue what they conceive to be just claims against the City, but whether they may pursue them in the federal courts in Indiana rather than in its state courts. The fact that Chase prefers the adjudication of its claims by the federal court is certainly no reason why we should deny the plain facts of the controversy and yield to illusive artifices. Settled restrictions against bringing local disputes into the federal courts cannot thus be circumvented.

"These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the

federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. See Madisonville Traction Co. vs. St. Bernard Min. Co., 196 US 239 255, 49 L. Ed. 462, 468, 25 S. Ct. 251, and Ex parte Schollenberger, 96 US 369, 377, 24 L. Ed. 853, 854. The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business. See Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harvard L. Rev. 483, 510; Shamrock Oil & Gas Corp. vs. Sheets, 313 US 100, 108, 109, 85 L. Ed. 1214, 1219, 61 S. Ct. 868; Healy vs. Ratta, 292 US 263, 270, 78 L. Ed. 1248, 1253, 54 S. Ct. 700. 'The policy of the statute (conferring diversity jurisdiction upon the district courts) calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of the controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution*** Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Healy vs. Ratta, supra (292 US at 270, 78 L. Ed. 1253, 54 S. Ct. 700). In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy. See Hepburn & Dundas vs. Ellzey, 2 Cranch (US) 445, 2 L. Ed. 332; New Orleans vs. Winter, 1 Wheat. ('S) 91, 4 L. Ed. 44; Morris vs. Gilmer, 129 US 315, 328, 329, 32 L. Ed. 690, 694, 695, 9 S.

Ct. 289; Susquehanna & W. Valley R. & Coal Co. vs. Blatchford, 11 Wall. (US) 172, 20 L. Ed. 179; Shamrock Oil & Gas Corp. vs. Sheets, 313 US 100, 85 L. Ed. 1214, 61 S. Ct. 868; and compare Grant ex dem. Meredith vs M'Kee, 1 Pet. (US) 248, 7 L. Ed. 131; Elgin vs Marshall, 106 US 578, 27 L. Ed. 249, 1 S. Ct. 484; Healy vs Ratta, 292 US 263, 78 L. Ed. 1248, 54 S. Ct. 700; McNutt vs General Motors Acceptance Corp., 298 US 178, 80 L. Ed. 1135, 36 S. Ct. 780."

A further indication of the "proper objects" of the federal judicature as conceived by Congress is noted in the provisions of *28 U. S. C. Section 1339* wherein it is provided:

"A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

As pointed out in *Cyclopedia of Federal Procedure, Second Edition, Vol. 1, page 457* the foregoing quoted clause is designed to prevent assignments to give jurisdiction where the assignor could not sue. The instant case does not present improper assignment, but we suggest that a state statute should not be given such effect as to accomplish what the parties themselves could not have done.

In the case of *Steinberg vs. Toro, 95 Fed. Supp. 791 at page 795, D. Puerto Rico*, the Court observed:

"Congress in conferring jurisdiction upon the federal courts to entertain suits between citizens of

the different states intended that when a citizen of one state sought to enforce or protect a right against a citizen of another state he should be entitled to invoke the jurisdiction thus conferred upon the federal courts as a matter of right. When a suitor comes within the requirements of diversity jurisdiction he should be able to successfully invoke it whatever his reasons and a refusal to exercise jurisdiction in such cases would thwart the very purpose for which such jurisdiction was conferred. *However, the federal courts are courts of limited jurisdiction and it is elementary that Congress in conferring diversity jurisdiction upon them did not intend thereby to open those courts to suitors who by sham, pretense or fiction acquired an apparent or spurious status that would enable them to invoke federal jurisdiction.* It was in recognition of this limited nature of the diversity jurisdiction of the federal courts that Congress since the earliest days has enacted legislation designed to prevent suitors from invoking that jurisdiction through the collusive creation of the right to invoke such jurisdiction by a transferror who could not have so invoked that jurisdiction.

"The clear purpose of that legislation has been to close the federal courts to litigants who properly should litigate their controversies in state tribunals except where there exists a real diversity of citizenship. And it is within the purview of such congressional intent that *the federal courts not only should prevent unauthorized incursions upon their jurisdiction but that they should be alert to ascertain and to aggressively defend against any attempted invasions of their diversity jurisdiction.*"
(emphasis ours)

The fact that diversity jurisdiction is granted the federal courts "to guard against possible discrimination by state courts in favor of resident over non-resident litigants is clearly emphasized by the statutes and jurisprudence dealing with the removal of cases. *Title 28, U.S. C. Section 1441* provides that removal from state courts to federal courts may be *by the defendant.* As stated by Judge Holmes in the case of *Sheets vs. Shamrock Oil & Gas Corp., 115 Fed. (2) 880 at page 883, C.A. 5:*

> "Only defendants may remove, either on the ground of a federal question or by reason of diversity of citizenship. *In cases of diversity the right is given only to non-resident defendants.*" (emphasis ours)

The reason for such a restriction is quite apparent. No one can claim to be prejudiced when he is sued in the court of his own residence and domicile.

COMPLAINANT'S ACTION AND THE APPLICABLE LOUISIANA STATUTES

The instant suit is nothing more than the usual common garden variety personal injury action. The plaintiff, Mrs. Florence Elbert, alleged that Mrs. S. W. Bowen, the driver of a vehicle from which she had just alighted, committed certain acts of negligence which resulted in injuries for which she seeks damages. Under the law of Louisiana the sole and only basis for such a claim arises by virtue of the provisions of *Louisiana Civil Code Article 2315* which stipulates:

> "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it*****"

We call Your Honors particular attention to the fact that this codal provision by its express terms *"obliges him by whose fault it happened"* to become responsible for such damages as may have resulted.

The instant action is brought by complainant against the Lumbermens Mutual Casualty Company alone as the liability insurer of Mrs. S. W. Bowen under the provisions of *Louisiana Revised Statute 22:655* which have been hereinbefore set forth in full.

We direct the Court's attention to the fact that the Louisiana Direct Action Statute does not create any new basis for a person injured by the negligence of another to seek damages but it merely provides that "the injured person***shall have *a right of direct action* against the insurer *within the terms and limits of the policy*****." This principle has been consistently recognized by the courts of Louisiana. In the case of *Reeves vs. Globe Indemnity Company of New York, 182 La. 905, 162 So. 724* the Supreme Court of the state through the now Chief Justice Fournet said:

> "The plaintiff exercised her statutory optional right to institute this suit against the defendant alone rather than jointly and in solido against the defendant and King (assured). However, that fact did not change the nature of the action from one ex delicto to an action ex contractu. *The cause that*

gave rise to the right of action has not been changed, nor does the statutory right of action against the defendant change the nature of the demand." (emphasis ours)

In *Ruiz vs. Clancy, 182 La. 935, 162 So. 734*, one of the landmark cases in the Louisiana jurisprudence interpreting the effect of this direct action statute the late Chief Justice O'Niell stated:

"An insurance company therefore, may — as the company did in this instance — limit the coverage, or liability of the company, to the obligation to pay only such sums as the insured shall become obligated to pay by reason of the liability imposed upon him by law. The attorney for the insurance company contends that the statute would interfere with the freedom of parties to enter into contracts, and would be therefore unconstitutional, if it forbade insurers to limit their so-called coverage, in liability insurance policies, so as to cover only the legal liability of the insured. The statute does not purport to do that****.

"It's virtually conceded, therefore that****(plaintiffs)****have no cause or right of action against the insurance company unless they have a cause of action against****(the insured)."

The Chief Justice further observed:

"With regard to the merits of a claim against an insured, the statute does not give the claimant a right of action against the insurance company unless the claim against the insured is well founded in law."

See also *Mock vs. Maryland Casualty Company, 6 So. (2) 199*

In the case of *Burke vs. Massachusetts Bonding & Insurance Company, 209 La. 495, 24 So. (2) 875*, the Court asserted:

> "But the statute merely gives a claimant a direct right of action against the liability insurer when he has a cause of action against the insured.****"

A thorough consideration of the opinions rendered by the Supreme Court of Louisiana will show that it is definitely recognized that the Louisiana Direct Action Statute does not prevent an insurer from stipulating that *it shall only be obligated to pay such sums as the insured shall become legally obligated to pay by reason of the liability imposed upon HIM by law.* Subsequent to the above mentioned interpretations of the Statute by the courts, the legislature of Louisiana has re-enacted the Statute several times without making any change as to contracts issued within the State of Louisiana (Act 55 of 1930, Act 541 of 1950). The established rule of statutory construction that where a statute has been re-enacted without change, the interpretation which has been placed upon it by the Supreme Court must be considered as having been adopted along with it, is recognized by the courts of Louisiana. *Lehman vs. Lehman, 130 La. 960, 58 So. 829.*

Keeping in mind the fact that the Direct Action Statute does not "change the cause of action" which arises in favor of the injured person and does not prohibit the insured from limiting its liability "so as to cover only

the legal liability of the insured," let us examine the contract of insurance entered into by and between the Lumbermens Mutual Casualty Company and S. W. Bowen under which the complainant herein seeks to recover. What are the pertinent "terms and limits" of that contract? We find that the company obligates itself "to pay on behalf of the insured all sums *which the insured shall become legally obligated to pay* as damages because of bodily injury****."

IS THIS ACTION ONE OF THE "PROPER OBJECTS" OF THE FEDERAL JUDICATURE?

Turning now to the basis upon which complainant seeks jurisdiction of the federal court, we again consider the provisions of Title 28 U.S.C. Section 1332(a). We see there that the jurisdictional requirements demand that *the matter in controversy* must be between citizens of different states.

Let us be practical and approach the matter as suggested by this Court in the case of *City of Indianapolis et al vs. Chase National Bank, 314 U.S. 63, 86 Law Ed. 47* and disregard the "mechanical rules" and ascertain "the principal purpose of the suit and the primary and controlling purpose of the suit and the primary and controlling matter in dispute." In applying these fundamental principles the district judge immediately and correctly recognized that this case does not present a matter in controversy between *the plaintiff and the insurance Company.* The company's liability under its contract with the insured becomes fixed once the insured has been found to

be legally obliged to pay the plaintiff damages. "Until that is done, the cause of action created by Article 2315 of the Civil Code, in favor of the plaintiff, growing out of the fault constitute the 'primary and controlling matters in dispute'." (District Court opinion R-20)

The purpose of this suit is to establish that Mrs. Bowen, a citizen of Louisiana, negligently injured Mrs. Elbert, a citizen of the same state. There are no allegations in the complaint of any acts of negligence on the part of the Lumbermens Mutual Casualty Company which would give rise to a claim for damages under the Louisiana codal provisions. If this matter were to be tried, the jury would not be called upon to determine if this defendant committed acts of actionable negligence but would be asked to find whether or not Mrs. Bowen had acted in such a manner as *to render her liable* for damages.

A very analogous situation was considered in the case of *Lake vs. Texas News Company, 51 Fed. (2) 862, C.A. 5.* In that action the defendant insurance company attempted to remove a case from the state court to the federal court on the grounds that, as between the plaintiff and the insurer, there existed a "separate controversy."

Judge Hutcheson reasoned (at page 864):

> "While, therefore, it is perfectly clear that the insurance company in this case was not a primary wrongdoer in the sense of having directed or authorized, or brought about the commission of the tort, and at common law the cause of action against it and its insured would not have been a joint one, it seems

plain to me that there *is only one primary controversy in this case, whether or not plaintiff has been injured by the culpable act of the insured.*****

* * * * * * * *

"For here, in fact and I think in law, is only one controversy.*****"

The court below reversed the district judge and disposed of the issues presented by merely stating "plaintiff is here insisting that upon principle and authority, and particularly upon that of our cases cited in the note *(New Amsterdam Casualty Company vs. Soileau, 167 Fed. (2) 767; Fisher vs. Home Indemnity Company, 198 Fed. (2) 218; Cushing vs. Maryland Casualty Company, 198 Fed. (2) 536)* the judgment was wrong and must be reversed. We agree *****." (R-47)

We are at a complete loss as to the "principle" to which the court below referred and further submit that the authorities cited not only did not pass judgment upon the contentions advanced but did not even consider these issues.

The pricipal authority relied upon by complainant and the court below is the decision rendered by that court in the case of *New Amsterdam Casualty Company vs. Soileau, 167 Fed. (2) 767.*

A careful study of that case shows that from beginning to end the question which was being considered was whether the direct action statute was procedural or substantive. In the Soileau case the Court held that it

was *both* procedural and substantive. We cannot complain of that conclusion. It is obvious that the statute does include some substantive provisions of law; this is made apparent by examining the Act from its very beginning. The original act was 253 of 1918 of the Legislature of Louisiana which provided:

> "That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and, in case of such insolvency or bankruptcy, an action may be maintained within the terms and limits of the policy by the injured person or his or her heirs, against the insurer company."

One of the principal reasons for such legislation was explained by Chief Justice Taft in the case of *Merchants Mutual Automobile Liability Insurance Company vs. Smart, 267 US 126, 69 Law Ed. 538* in discussing a New York statute similar to the Louisiana act of 1918:

> "Another reason for the legislation is ****that it was enacted***** to make impossible a practice of some companies to collude with the insured after an injury foreshadowing heavy damages had occurred, and to secure an adjudication of the insured in bankruptcy whereby recovery on the policy could be defeated because the bankrupt had sustained no loss."

In the above considered respect the Louisiana statute is certainly substantive, but it still remains that there is nothing either in the 1918 act or its successors which changes the cause of action which exists in favor of the injured person. This conclusion is emphasized by the assertions of the Louisiana Supreme Court in the case of *West vs. Monroe Bakery, 217 La. 189, 46 So. (2) 122* wherein the Court held that actions instituted by an injured party under the statute were "subject only to such defenses *as the tort-feasor himself may legally interpose.*" (emphasis ours)

Further evidence showing that it is the cause of action which exists in favor of the injured person as against the actual tort-feasor is found in the fact that the direct action must be brought at the domicile of the tort-feasor or where the accident happened and cannot be maintained at the domicile of the insurance company. *Miller vs. Commercial Standard Insurance Company, 199 La. 515, 6 So. (2) 646.*

The Court in the Soileau case at no point indicates that it made any examination into the question as to whether or not the *matter in controversy* was between citizens of different states. All that was said by that Court bearing in any manner upon the question of diversity jurisdiction was as follows:

> "The Act of 1918, as amended by the Act of 1930, makes the indemnity in favor of the insured inure to the benefit of the person who thereafter is injured by the negligence of the insured. Lawrason vs.

> Owners Automobile Insurance Company of New Orleans, supra, and Merchants Mutual Automobile Liability Insurance Company vs. Smart, supra. In other words, it subrogates the injured person to all the rights of the insured within the terms and limits of the policy. Where the asserted right of action arises by subrogation and not by assignment, the subrogated party may sue on such right in a federal court if there is diversity of citizenship between him and the defendant, though the original debtor and the defendant are citizens of the same state."

In both of the cases cited by the Court in the above quotation it must be noted that the claims of the injured party against the insured had been determined and the *matter in controversy* was the liquidation of the obligation which had been found to be imposed upon the insured. In such instances it is quite proper to say that the injured party is subrogated to the rights of the insured as against the insurer. Under the contract of insurance the insured has the right to call upon the insurer to pay such sums as he has been found obligated to pay to the injured person. Until he has been adjudged responsible to pay the injured party, what right has the insured as against his insurer? Other than to call upon the company to afford him counsel for his defense there is absolutely no right or cause of action vested in the insured until he has been condemned to pay!

> "Subrogation is not assignment. The most that can be said is that the subrogated creditor by operation of law represents the person to whose right he is subrogated."

City of New Orleans vs. Whitney, Adm., 138 U.S. 595, 34 Law Ed. 1102.

No one by any stretch of the imagination can believe that an injured person in instituting an action, against a public liability insurer, which calls for the determination of whether an insured is obligated to pay him damages as the result of the insured's alleged acts of negligence "represents the person (the insured) to whose right he is subrogated."

The other decisions cited, *Fisher vs. Home Indemnity Company, 198 Fed. (2) 218, C.A. 5* and *Cushing vs. Maryland Casualty Company, 198 Fed. (2) 536, C.A. 5*, also opinions of the court below, do not discuss at any point the issues which were presented by the instant case and are now up for consideration.

The most that can be said for the authorities cited by the court below is that that court had reached the conclusion that the Direct Action Statute of Louisiana was both substantive and procedural, but without defining wherein the Act is substantive and which part is procedural. This Statute is analogous to the provisions of Louisiana Civil Code Article 2334 and 2402. The Supreme Court of Louisiana in discussing those provisions said:

> "The right given by Articles 2334 and 2402 of the Civil Code to a married woman to claim damages for her personal injuries as her separate property and in her own name is *both* substantive and remedial. The declaration of the law that the right of action is her personal property is substantive,

> and the provision that it is recoverable by her 'alone' is remedial."
>
> *Matney vs. Blue Ribbon, 205 La. 505, 12 So. (2) 253*

We submit that the granting to the injured party of a right of action against the insurer is substantive and that those provisions in the Direct Action Statute providing that the injured person may sue the insurer and the insured, or either of them alone, are remedial and should affect only proceedings in the state courts.

In no event does this Statute change the fact that the true matter in controvery is the determination of rights between the injured party and the alleged tort-feasor.

THE ACCEPTANCE OF JURISDICTION IN CASES OF THIS NATURE IS IN DIRECT CONFLICT WITH THE PURPOSE OF THE DIVERSITY JURISDICTION

To maintain that the federal court is vested with jurisdiction in matters of this sort would require that the very purpose of, and the sole justification for, diversity jurisdiction be ignored.

> "Congress granted jurisdiction to the federal courts in diversity of citizenship cases to guard against possible discrimination by the state courts in favor of resident over non-resident litigants.****"
>
> *Am. Juris. Vol. 54, par. 57, page 710.*

If the direct action statute passed by the legislature of Louisiana is held to be sufficient to vest jurisdiction

in the federal court because of diversity of citizenship between the claimant and the insurance company, the reason for the existence of diversity jurisdiction is clearly defeated. No judge of any court can shut his eyes to the fact that an injured plaintiff has a definite advantage in trying his case before a jury where the defendant is an insurance company. The mere mention of insurance to a jury is reversible error in most of the states of this union. *4 ALR(2) 761.* The general rule that the existence of insurance is such information as should not be imparted to a jury is premised upon the idea that a jury will not or cannot bring in a fair verdict if they know that the defendant is insured against liability. The courts of this nation ascribe various reasons supporting that rule. In some courts it is merely considered to be irrelevant to the other issues involved. *Lee vs. Osmundson, 289 NW 63, S. Ct. of Minn.* In others, it is said to influence jurors to bring in verdicts based upon scanty evidence. *Lavigne vs. Ballantyne, 17 Atlantic (2) 845, S. Ct. of R.I.* And again it said that it encourages jurors to assess higher damages than they otherwise would. *Buehler vs. Festus Mercantile Company, 119 SW(2) 961, S. Ct. of Mo.* And it has been recognized that it prevents the jury because of passion and prejudice from deciding the case strictly on the merits. *White vs. Makela, 8NW(2) 123, S. Ct. of Mich.* The principle and the reasons therefor are well recognized. *Altenbaumer vs. Lion Oil Company, 186 Fed. (2) 35, C.A. 5.*

Complainants pointed out in the court below in support of their contentions that jurisdiction in cases of

this nature had been accepted by the federal courts in Louisiana for a number of years. We submit that the repeated commission of error, even by the courts of the United States, is no basis for the continuation of such error. In the famous case of *Erie Railroad vs. Tompkins, 304 US 64, 82 Law Ed. 1188* this Court announced:

> "Thus the doctrine of Swift & Tyson is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct'."

FINAL AND COMPLETE JUSTICE CANNOT BE RENDERED UNLESS THE TORT-FEASOR IS A PARTY TO THE PROCEEDINGS.

In actions of this nature there are always two questions which must be judicially determined; first, is the insured tort-feasor responsible for plaintiff's injuries; second, is the insurer responsible therefor. The latter of these two problems involves the determination of the rights and responsibilities existing between the tort-feasor and his insurer. If the tort-feasor is not a party to the proceedings such determination as is made certainly is not binding upon him. Judge Rives of the court below in his dissenting opinion recognized this pertinent point (R 57-59):

> "If the district judge and I are mistaken and diversity jurisdiction does exist, it seems to me that the insured is an indispensable party defendant. 'Whether parties are indispensable must be determined by the federal court according to federal rather than state rules, for the question of their jurisdic-

tion is one which the federal courts must determine for themselves.' *Ford vs. Adkins, 39 F.S. 472, 474.* See also *De Korwin vs. First National Bank of Chicago, 156 F. 2d 858; 3 Moore's Federal Practice* (2nd ed.) Sec. 19.07, pages 2152, 2153.

"The principles announced by Mr. Justice Curtis in *Shields vs. Barrow*, 17 How. 130, 136, as to when parties are indispensable are still sound despite the difficulty in application of those principles. See 3 Moore's Federal Practice, Sec. 19.07, page 2150. Among other tests, a person is an indispensable party if his presence is necessary to enable the Court to do complete and final justice between the parties before the court and, further, if the interest of the absent party is 'of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.' *Shields vs. Barrow, supra.* This court has said that 'the fact that the decree would not be technically binding on the absent parties is not the controlling factor.' *Keegan vs. Humble Oil & Refining Company*, 155 F. 2d 971, 973. In *California vs. Southern Pacific Company*, 157 U.S. 229, 255 the Supreme Court says:

" 'Irrespective, then, of the extent, technically speaking, of the effect and operation of a decree as to the seven parcels, based on that ground, as *res adjudicata*, it is impossible to ignore the inquiry whether the interests of persons not before the court would be so affected and the controversy so left open to future litigation as would be inconsistent with equity and good conscience.'

"While the injured person under the Act has a right of direct action against the insurer, the insured also has certain property rights in the insurance policy, viz. the insured has the right to be protected from liability to the (fol. 85) extent of the coverage of the policy, whether to the injured person or to some other person who has been or may be injured during the term of the policy.

"If the injured party sues the insured first and the insurer has notice of the litigation and an opportunity to control its proceedings, the insurer is bound by the determination of liability of the insured. 8 Applemar's Ins. Law & Practice, Sec. 4860, and cases cited. Whether the reverse holds true, that is, whether the insured would be bound by the determination of liability against his insurer, is a much more difficult question. See 29 Am. Jur., Insurance Sec. 1084; Annotations, 137 A. L. R. 1016, 121 A. L. R. 890; 50 C. J. S., Judgments, Sec. 789. If the insured is so bound, then obviously he is an indispensable party defendant for he may lose his counterclaim against the injured person or may be deprived of a part or all of his insurance protection without having his day in court.

"Even, however, if the judgment would not be technically binding on the insured as to the issue of liability, that fact is not the controlling factor in determining whether the insured is an indispensable party. *Keegan vs Humble Oil & Refining Company*, 155 F. 2d 971, and authorities there cited. The injured party, having failed in a suit against the insurer direct, might still sue the insured. The judgment in the first suit would not conclusively estop the injured party for the issues would be different and it might be that that judgment was based

on the failure of proof as to the existence and coverage of the policy, matters not involved in the suit against the insured. The injured party having recovered against the insured, the insured could then call on the insurer to pay the damages (fol. 86) and the fact that the insurer had successfully defended against the injured party would be no answer to the insured. The result follows that if the injured party is permitted to sue the insurer alone in the federal court, the court cannot do final and complete justice and the controversy may be left in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

THE TRIAL OF THESE CASES IN THE FEDERAL COURT LEADS TO A RESULT SUBSTANTIALLY DIFFERENT FROM THAT WHICH WOULD BE ATTAINED IN THE STATE COURT.

The trial of cases of this nature by jury is provided under the law of Louisiana *but the appellate courts have the right and the duty to review both the law and the facts in all civil cases. Louisiana Constitution of 1921, Article 7, Sections 10, 29.* The practice in the courts of Louisiana is well outlined in the opinion of Mr. Justice McLean in the case of *Parsons vs Bedford, 3 Pet. 433 at 449, 7 Law Ed. 732 at 737.* Thus it appears that in the application of the direct action statute the appellate courts of the state are not only entitled to, but are under a duty to, *review the evidence and to determine for themselves the facts* upon which their ultimate decision must rest and, if their conclusions do not coincide with that of the trial jury,

they make their own findings of fact and render judgment accordingly. These appellate judges being trained, experienced Louisiana jurists, the dangers which arise out of the direct action proceedings from the prejudice and bias against insurance companies which exists in the minds of the ordinary lay juror is thereby corrected. The federal courts, on the other hand, are forbidden to re-examine any fact tried by a jury otherwise than according to rules of the common law. *Wright vs Paramount-Richards Theatres*, 198 Fed. (2) 303, C.A. 5.

In the case of *Reagan vs Merchants Transfer & Warehouse Company*, 337 U.S. 530, 93 Law Ed. 1520, Mr. Justice Douglas pointed out that in diversity cases the rights enjoyed under local laws should not vary because enforcement of those rights was sought in the federal court rather than in the state court. Mr. Justice Frankfurter in *Guaranty Trust Company vs York, 326 U.S. 96, 89 Law Ed. 2079* declared that in such cases the outcome of the litigation in the federal court should be substantially the same as it would be if tried in a state court.

There is no doubt but that plaintiffs in these proceedings obtain an advantage in the federal court which does not exist under the state procedure. Judge Rives observed (R-52):

> "This court would be naive not to realize that that factor has much to do with the bringing of most of the automobile damage suits in the federal courts rather than in the state courts of Louisiana."

The matters involved in these actions are of a purely local nature. This Court has recognized that in the proper administration of justice the federal court may and should decline to exercise jurisdiction in such instances because the acceptance would be prejudicial to the public interest and would not show proper regard for the rightful independence of state governments in carrying out their domestic policy. *Burford vs. Sun Oil Compay, 319 U.S. 315, 87 Law Ed. 1424.*

The policy of Louisiana as to this type of action is well determined. Various attempts have been made to amend or repeal the statute, the most recent being House Bill 600 which was unsuccessfully introduced in the 1954 legislature. But it must also be recognized that it is equally the well settled desire of the Louisiana citizens that their appellate courts review and determine the facts in each of these cases. Efforts to change this procedure have also been rejected on various occasions by the legislature. Senate Bill 125 (1954 legislature) designed for that purpose was the latest unsuccessful attempt to have the Louisiana appellate courts bound by the findings of fact of their juries . The exercise of jurisdiction by the federal court in these cases would result in disregard of this established domestic policy of the State of Louisiana.

CONCLUSION

The courts of this nation are designed for the administration of justice and to afford all litigants a fair, unprejudiced and impartial hearing of their problems and

putes. If this function is to be properly carried out in es of this nature, the decision of the court below must reversed and the judgment of the district court sus- ning defendant's (petitioner herein) motion to dismiss lack of jurisdiction should be reinstated.

Respectfully submitted,

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